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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 529

LOFFLAND BROTHERS COMPANY
and
THE TRAVELERS INSURANCE COMPANY

v.

WILLIE J. TEICHMAN and
C. D. CALBECK, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT CALBECK, DEPUTY COMMISSIONER, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 26-33) is reported at 294 F. 2d 175. The opinion of the District Court (Pet. App. 21-25) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1961. The petition for rehearing was denied on September 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the particular facts in this case the employee was precluded from receiving compensation for an injury under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) because he had previously brought an unsuccessful suit against his employer under the Jones Act (46 U.S.C. 688) based upon a different injury.

STATUTES INVOLVED

Pertinent sections of the statutes involved are set forth in the Appendix, *infra*, pp. 11-15.

STATEMENT

The material facts pertinent to the employee's injury are set forth in the findings of the Deputy Commissioner (Pet. App. 17-20). The employer, Loffland Brothers Company, is engaged in exploration of the subsoil and seabed of the Outer Continental Shelf in the Gulf of Mexico for oil. Willie J. Teichman was employed at an average wage of $103.04 a week by Loffland Brothers as a "floorman" oil driller. On January 1, 1956, Teichman was assigned to work on employer's rig No. 79, approximately 18 miles east of

the coast of Galveston County, Texas. He boarded a personnel-carrying tug boat (the Stanolind 20) which took him and other workmen from shore to the drilling rig. When he jumped from the tug to the supply ship (the Stanolind 50) which was moored to the drilling rig, he felt severe pain in his back. Several hours later, after he complained of the pain, his supervisor and the captain of the supply ship determined that he should be returned to shore. Accordingly, Teichman was placed in a heavy metal basket which was attached to a line on a crane. The basket was lifted by the crane and moved over the deck of the tug and lowered. The basket struck the deck of the tug with considerable force. As a result of this impact, Teichman sustained a ruptured intervertebral disc, and other back injuries and complications which totally disabled him (Pet. App. 17-19).

In addition to filing an administrative claim under the Longshoremen's Act, Teichman, on September 27, 1956, gave notice of election to recover damages against a third person pursuant to 33 U.S.C. 933 (Pet. App. 23, 28). He then filed a suit in the federal District Court for the Southern District of Texas against the employer and the Stanolind Oil & Gas Co., later the Pan American Petroleum Corp., the owner of the tug and the supply ship, asserting unseaworthiness of the vessel and negligence. Insofar as the employer was named as a party defendant, the pleading asserted jurisdiction against the employer under the Jones Act (46 U.S.C. 688, *infra*, p.). In the original pleading, Teichman alleged that he was in-

jured when he jumped from the tug to the supply boat (Stanolind 50), and was further injured when the metal basket was lowered by the crane onto the tug (Stanolind 20) (Pet. App. 22). In an amended petition, however, he alleged injury from the first (jumping) incident only, and omitted all of the allegations pertaining to the second (basket lowering) incident (Pet. App. 22). For its first defense the employer asserted that the Longshoremen's Act provided the exclusive remedy for Teichman, since he was a driller, and not a seaman (Pet. App. 29).

The civil action against the employer and shipowner was tried to a jury in the District Court. Teichman testified as to the nature of his duties (primarily those of a driller) on the derrick and supply ship and, when asked on cross-examination if he was a seaman, he conceded that he was not (Pet. App. 29). He testified about jumping from the tug to the supply ship, but when he started to describe the second (basket lowering) incident, defense counsel objected, and no testimony about that injury was received (Pet. App. 29). The case was submitted to the jury upon special interrogatories. In response to the first, "Did the plaintiff, Willie J. Teichman, receive an injury on January 1, 1956, as he was boarding the vessel Stanolind 50?", the jury's verdict was that "the plaintiff did not receive such injury" (Pet. App. 29). In accordance with the court's instructions, the jury did not answer the remaining questions as to the plaintiff's status as a seaman, negligence, etc. (Pet.

App. 23, 29). Judgment was entered for the defendants on June 21, 1958 (Pet. App. 30).

Following the employer's controversion of Teichman's administrative claim for benefits under the Longshoremen's Act, the Deputy Commissioner held a hearing on his claim. The "principal contention" of the employer and the insurance carrier was that Teichman was "estopped by a verdict and judgment" in the civil suit. To support this contention they offered the judgment, pleadings and motions in the civil suit, and the testimony of Teichman, but little or none of the rest of the testimony given in that suit (Pet. App. 30). On the merits, the parties offered lay and medical testimony pertaining to the second (basket lowering) incident. The Deputy Commissioner found that the jury had decided only that Teichman was not injured as a result of the first (jumping) incident (Pet. App. 18). He accepted the jury's decision on that question, concluded that Teichman was injured as a result of the second (basket lowering) incident, and based his award on that injury (Pet. App. 18).

In an action to review the award brought by the employer and its insurance carrier, the District Court ruled that the Deputy Commissioner's findings were supported by substantial evidence (Pet. App. 23). However, it held that Teichman was barred from recovering compensation under the Longshoremen's Act as a result of the second injury, because he had based his civil action for the first injury on the premise that he was a seaman, and he could not assert before the Deputy Commissioner the inconsistent position

that he was not a seaman and therefore within the Longshoremen's Act (Pet. App. 23-25)

The Court of Appeals for the Fifth Circuit (per Hutcheson, J.) reversed, holding that Teichman's unsuccessful Jones Act suit for damages did not preclude his Longshoremen's Act claim (Pet. App. 32) and that the jury verdict that Teichman was not injured as a result of the jumping incident did not collaterally estop him from claiming injury as a result of the basket lowering (Pet. App. 32-33).

ARGUMENT

The Court of Appeals was clearly correct in deciding that the unsuccessful Jones Act suit for one injury did not preclude the claimant from receiving Longshoremen's Act compensation for a separate injury. Its decision is in accord with prior case law, and with the Congressional purpose in enacting the Longshoremen's Act and the Jones Act. There is no conflict with the decisions of other courts. Moreover, the decision turns in large part upon the particular facts in the record in this case. Accordingly, there is no occasion for review by this Court.

1. Since one of the purposes of the Longshoremen's Act was to provide certain and inexpensive relief for injuries to workmen, any rule of law which forced the worker to choose at his peril between uncertain but mutually exclusive remedies would tend to defeat that Congressional purpose. *Davis* v. *Dept. of Labor*, 317 U.S. 249, 254. Whether an employee is entitled to Jones Act relief or to Longshoremen's

Act compensation depends upon the factual determination of whether or not he is a "member of a crew."[1] Accordingly, the proper remedy for an injured workman such as Willie Teichman is uncertain and difficult to predict.[2] The District Court's holding that an employee is barred from receiving Longshoremen's Act relief for one injury, because he had unsuccessfully sought Jones Act recovery for a prior injury, unnecessarily creates a substantial risk of a complete lack of recovery in a situation where the employee is concededly covered by one or the other of the two complementary Acts. By reversing that decision, the Court of Appeals furthered the general Congressional purpose of providing certain and inexpensive relief for injured employees and the specific intent to minimize the risks of an erroneous choice of remedy.[3]

The decision of the Court of Appeals is in accord with the only other decision we have been able to find involving the effect of a Jones Act suit upon the employee's right to Longshoremen's Act compensation. *Pacific Employers Insurance Co.* v. *Pillsbury*, 130 F. 2d 21 (C.A. 9). See *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (C.A. 6). It is also in accord with the analogous holding that a claim for coverage under the Longshoremen's Act is not barred by a prior, theoretically inconsistent, claim for compensation under a state workmen's compensa-

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[1] *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251; *Gianfala* v. *Texas Co.*, 350 U.S. 879.

[2] *Norton* v. *Warner Co.*, 321 U.S. 565, 569.

[3] *Norton* v. *Warner Co.*, 321 U.S. 565, 569. See also, 33 U.S.C. 913(d), 915(b), 916, and 933(f), *infra*, p. .

tion act. *Massachusetts Bonding & Insurance Co.* v. *Lawson*, 149 F. 2d 853 (C.A. 5); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C.A. 4); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C.A. 9).

Finally, the decision of the Court of Appeals is also consistent with the federal decisions concerning the effect of adopting inconsistent positions in successive court actions. Since, under the modern rules of practice, a party is permitted to take inconsistent positions in the same suit,[4] there is little justification for suppressing the truth by precluding him from taking inconsistent positions in separate proceedings, at least where the prior position was not successfully maintained and the rules of collateral estoppel do not apply. *Parkinson* v. *California Co.*, 233 F. 2d 432, 438 (C.A. 10); *Parker* v. *Sager*, 174 F. 2d 657, 661 (C.A.D.C.); *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 99 F. 2d 9 (C.A. 1), certiorari denied, 305 U.S. 659. Accord, *Dixie Sand & Gravel Corp.* v. *Holland*, 255 F. 2d 304 (C.A. 6); *Scarano* v. *Central R. Co. of New Jersey*, 203 F. 2d 510, 513 (C.A. 3).[5]

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[4] *E.g.*, Rule 8(e)(2), F.R.Civ.P.

[5] Petitioners rely upon *Scarano* v. *Central R. Co. of New Jersey*, *supra*, as the only appellate authority to support their view that Teichman was precluded from asserting that he was not a member of a crew in the Longshoremen's Act claim. But, as the opinion in that case makes clear, the decision was premised on the fact that since the plaintiff had "obtained relief" in the first suit, judgment in the second suit upon an inconsistent position would result in double compensation for the same injury. 203 F. 2d at 513-514.

2. As the primary ground for seeking review in this Court, petitioners urge that Teichman was estopped by the judgment in the jury case from showing that he was injured as a result of the second (basket lowering) incident (Pet. 7-11). Petitioners' argument is based upon their belief that the jury decided that Teichman's back impairments were due solely to a pre-existing back condition (Pet. 9). However, the Deputy Commissioner and the courts below all found that the jury decided only that Teichman received no injury as a result of the "jumping" incident, which was the sole basis of his amended complaint (Pet. App. 18, 22, 29). Since the jury did not have before it the facts of the "basket lowering" incident it could not and did not decide whether that incident caused an injury. Therefore, the Court of Appeals properly ruled that the issue of injury as a result of that incident had not been determined in the jury action, and that Teichman was not collaterally estopped to show that he was in fact injured as a result of the basket lowering incident. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353. Restatement, *Judgments* § 68. In any case, since the application of the doctrine of collateral estoppel turns upon the question of what the jury decided, it rests upon the facts and circumstances of this case and does not present a question of general importance warranting review by this Court.

3. Petitioners also contend that Teichman was precluded from asserting his Longshoremen's Act claim because he elected to proceed under the Jones Act (Pet. 12-13). This contention overlooks the obvious

fact that, as to the injury arising out of the basket lowering incident, Teichman elected to proceed under the Longshoremen's Act. Moreover, as petitioners concede, the doctrine of election of remedies applies only where two or more remedies are actually available (Pet. 12). Since the Jones Act and the Longshoremen's Act do not overlap here,[6] only one remedy was actually available to the claimant in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1961.

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[6] 33 U.S.C. 905; *Swanson* v. *Marra Bros.*, 328 U.S. 1, 6-7.

APPENDIX

STATUTES INVOLVED

The Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part:

§ 902. DEFINITIONS.

When used in this chapter—

* * * *

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

* * * *

§ 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel * * *

* * * *

§ 913. TIME FOR FILING OF CLAIMS.

* * * *

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to

recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

* * * *

§ 915. INVALID AGREEMENTS.

* * * *

(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

§ 916. ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS.

No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

* * * *

§ 920. PRESUMPTION.

In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * *

§ 933. COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

* * * *

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

* * * *

The Outer Continental Shelf Act, 43 U.S.C. 1331, *et seq.*, provides in pertinent part:

§ 1333. LAWS AND REGULATIONS GOVERNING LANDS.

* * * *

(b) Jurisdiction of United States district courts.

The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

(c) Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions.

With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations, * * *

Section 33 of the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. 688, provides in pertinent part:

> § 688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *
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